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In the Supreme Court of the United States

OCTOBER TERM, 1991

AL C. PARKE, WARDEN, PETITIONER

v.

RICKY HAROLD RALEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether due process requires the prosecution to prove the validity of prior convictions that are used for sentence enhancement, when the prior convictions resulted from guilty pleas that the defendant claims were invalid under *Boykin* v. *Alabama*, 395 U.S. 238 (1969).

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INTEREST OF THE UNITED STATES

The United States has a substantial interest in the proper resolution of the question presented in this case. Several federal statutes enhance a defendant's sentence based on prior convictions, including the Armed Career Criminal Act, 18 U.S.C. 924(e), and provisions of the Controlled Substances Act, 21 U.S.C. 841(b), 842(c), 843(c), and 844(a). In addition, a defendant's sentencing range under the federal Sentencing Guidelines depends in significant part on the

defendant's criminal history, which is determined mainly by reference to the defendant's prior convictions. See Sentencing Guidelines § 4A1.1. Defendants facing enhanced punishment under the statutes or the Guidelines frequently seek to challenge the validity of their prior convictions. When the prior convictions rest on guilty pleas, defendants often claim that the guilty pleas were invalid because they were not entered in compliance with *Boykin* v. *Alabama*, 395 U.S. 238 (1969). The questions whether such a claim is cognizable in a sentence enhancement proceeding, and, if so, which party bears the burden of proof on the issue are important to the administration of the federal sentencing enhancement provisions, particularly in cases in which the prior convictions are old and the transcripts of the plea proceedings have been lost or are otherwise unavailable.

STATEMENT

After entering a guilty plea in Kentucky state court on May 28, 1987, respondent was convicted of second-degree robbery and of being a persistent felony offender (PFO) in the first degree. A PFO offense is charged and proved separately from the underlying crime. The effect of a conviction on the PFO charge is to increase the minimum and maximum punishments for the predicate offense. Ky. Rev. Stat. § 532.080 (Michie/Bobbs-Merrill 1990). A first-degree PFO offense requires proof of two prior qualifying convictions, and a second-degree PFO offense requires proof of one such conviction. Respondent was found guilty of first-degree PFO based on two prior convictions. He was sentenced to five years in prison for the robbery, which was enhanced to ten years based on his PFO status. 5/28/87 Plea Tr. 11.

1. In seeking a penalty enhancement under the PFO statute, the Commonwealth introduced a January 3, 1980, conviction for third-degree burglary (to which respondent had pleaded guilty in 1979), and an October 8, 1981, conviction for third-degree burglary (to which respondent had pleaded guilty earlier that year). Respondent contended that both prior convictions were invalid under this Court's decision in *Boykin* v. *Alabama*, 395 U.S. 238 (1969), which reversed a guilty plea conviction because the record did not affirmatively show that the defendant's plea was voluntary and intelligent. Because transcripts of the 1979 and 1981 guilty plea proceedings were unavailable, and because respondent could not recall having been advised of his constitutional rights, respondent claimed that both convictions were invalid under *Boykin* and could not be used as a basis for sentence enhancement. 5/28/87 Tr. 3-5, 54-57.

At a hearing on respondent's motion to prevent the use of the two prior convictions, respondent testified that when he entered the first guilty plea in 1979, he was 23 years old and had never before been charged with a felony, although he had been arrested and fined several times on misdemeanor charges. 5/28/87 Tr. 7-9. Respondent was represented by appointed counsel in the 1979 case, *id.* at 9, and by retained counsel in the 1981 case, *id.* at 16. Respondent recalled that in 1979 the judge had asked him if his decision was induced by threats or promises or made under the influence of intoxicants or medication. *Id.* at 12-13. With respect to the 1981 case, respondent recalled that the judge also had questioned him to ensure that his plea was voluntary and had

informed him that he had a right to a jury trial. *Id.* at 19-20. Respondent did not recall any other warnings about constitutional rights in either case.

According to respondent, in 1979 and 1981 he was unaware that the prosecution had the burden of proving the offense, or that he had the right to remain silent and to confront the witnesses against him. 5/28/87 Tr. 20-22. Respondent conceded, however, that the judges in both cases might have said more than he recalled and that they might have advised him of his constitutional rights. *Id.* at 33-35, 41-42.

At the conclusion of respondent's testimony, the Commonwealth called Thom Marshall, the lawyer who had represented respondent in the 1979 case. Marshall did not specifically remember respondent, but he authenticated an official form that respondent had signed at the time of the 1979 plea. 5/28/87 Tr. 43-46. The signed form stated:

> I understand that I may, if I so choose, plead "Not Guilty" to any offense charged against me, and that if I should choose to plead "Not Guilty" the Constitution guarantees me (a) the right to a speedy and public trial by jury, (b) the right to see and hear all witnesses called to testify against me, (c) the right to use the power and process of the Court to compel the production of any evidence, including the attendance of any witness in my favor, and (d) the right to have the assistance of counsel for my defense at all stages of the proceedings.

11/29/79 Plea of Guilty ¶ 11. Marshall verified his signature on a 1979 form certifying that, among other things, he had explained respondent's constitutional rights to him. 5/28/87 Tr. 45-46.

After the hearing, the state trial court denied respondent's motion to exclude the two prior convictions,

finding that respondent "intelligently pled guilty in both of those prior instances, with full knowledge of the nature and consequences of a plea of guilty." 5/28/87 Tr. 60. Respondent's plea of guilty reserved the right to challenge the court's denial of his motion to exclude the two convictions.

2. The Kentucky Court of Appeals affirmed. Pet. App. A26-A33. The court rejected respondent's claim that the trial court erred in assigning him the burden of producing evidence that his prior convictions were invalid. *Id.* at A27. Rather, the court explained, after the Commonwealth proves the fact of the prior convictions, there is a "presumption of regularity" that the defendant must overcome by showing some infringement of his rights or some irregularity in the proceedings that led to the prior conviction. *Id.* at A28 (citing *Dunn* v. *Commonwealth*, 703 S.W.2d 874, 876 (Ky. 1985), cert. denied, 479 U.S. 832 (1986)). If the defendant introduces sufficient evidence to refute the presumption of regularity, the burden shifts to the Commonwealth to prove that the judgments were entered in a manner that protected the defendant's rights. Pet. App. A28.

The court held that the trial court did not commit clear error in finding that the 1979 and 1981 guilty pleas were valid. Pet. App. A30-A33. With respect to the 1979 guilty plea, the court found that there was sufficient evidence "to support [the] finding that [respondent] was made aware of his alternatives to pleading guilty, and that his 1979 guilty plea satisfied the dictates of *Boykin* v. *Alabama*." *Id.* at A31-A32. Although respondent did not specifically recall having been advised of his rights, the court observed that respondent had signed a waiver of his rights and that his attorney had explained those rights to him. *Id.* at A32. With respect to respondent's 1981 guilty

plea, the court noted that because respondent was advised of his rights in 1979, the court could infer "that he was still aware of his rights two years later in 1981." *Ibid.* In addition, the court found that respondent's "testimony indicate[d] that his knowledge and sophistication regarding his rights under our judicial system increased substantially after his first conviction." *Ibid.*

3. After the Kentucky Supreme Court denied review, respondent petitioned for a writ of habeas corpus from the United States District Court for the Western District of Kentucky. The district court denied the writ. Pet. App. A22-A25. The court explained that "the record plainly reflects that at the time of his guilty plea in late 1979, [respondent] was fully advised of his constitutional rights, and signed a paper admitting that he had been so advised." *Id.* at A25. The court reasoned that respondent's "understanding of those rights cannot be assumed to have evaported in the period of less than two years between that conviction and his 1981 conviction." *Ibid.* Accordingly, the court found "no basis for the claim that the guilty pleas to the predicate offenses were not knowingly and voluntarily entered." *Ibid.*

4. The court of appeals reversed. Pet. App. A3-A20. The court interpreted *Boykin* to mean that even with respect to a guilty plea conviction that is being used for enhancement purposes, the Constitution requires the prosecution to bear the burden of showing by clear and convincing evidence that the defendant in the prior guilty plea proceedings "knowingly and intelligently waived his rights to a jury trial, to confront his accusers, and to remain silent." *Id.* at A10. In view of the 1979 "Plea of Guilty" form and re-

spondent's admission that he signed that form, the court concluded that the Commonwealth had satisfied its burden as to the 1979 guilty plea. *Id.* at A14-A15. With respect to the 1981 guilty plea, however, the court concluded that respondent's waiver of his rights in 1979 did not establish that he had validly waived his rights in 1981. *Id.* at A15-A18. The court therefore ordered the district court to grant a writ of habeas corpus unless the Commonwealth could affirmatively show that the 1981 guilty plea was voluntary and intelligent. *Id.* at A20.

SUMMARY OF ARGUMENT

I. Statutes that enhance criminal penalties on the basis of prior convictions are commonplace. Because the enhanced sentences for defendants with prior convictions can be substantial, defendants have a great incentive to challenge the use of their prior convictions in enhancement proceedings. This Court has held that a defendant may challenge the use of a prior conviction for enhancement purposes, but the Court has permitted such challenges only where the conviction is infected by an error of the most fundamental sort: the complete denial of the right to counsel. The Court has never permitted a defendant in a sentence enhancement case to challenge a prior conviction based on an alleged flaw in the guilty plea proceeding that led to the conviction. And it has never suggested that the Due Process Clause requires the State to bear the burden of proving that the guilty plea proceeding was valid before the State can use the conviction for enhancement purposes.

A. If the Due Process Clause is to bar the use of a prior conviction for enhancement purposes, the defendant should have to show that the prior convic-

tion was fundamentally flawed because of an error equivalent to the complete denial of counsel. A legislature enjoys substantial freedom to define criminal offenses and prescribe punishments, as long as the scheme it adopts is rational. Thus, a legislature could insist that prior convictions be excluded from consideration for enhancement unless they are found to be wholly free from error. On the other hand, a legislature should be free to permit the use of prior convictions without regard to possible errors in the proceedings leading to those convictions, unless the errors are so grave that the resulting convictions necessarily lack reliability. Only with respect to a conviction of that sort is it irrational to impose a more severe sentence on a defendant based on a prior conviction.

There are powerful policy reasons to permit the use of prior convictions for enhancement purposes regardless of claims of procedural error in the prior proceedings. Challenges to prior convictions are, by definition, collateral attacks on final judgments. The interests in the finality of the prior judgments are similar to but even stronger than in the case of collateral attacks on convictions through habeas corpus. Moreover, a constitutional rule requiring courts to recognize a broad range of challenges to prior convictions would largely undermine the effectiveness of sentence enhancement statutes. Prior convictions frequently involve closed cases, and often come from other jurisdictions. While basic information about the convictions ordinarily can be found, record material such as transcripts and pleadings are often unavailable, either because the materials have been lost or because, for example, an appeal was never taken and the pertinent court sessions were therefore never transcribed.

B. The prohibition against challenges to prior convictions that are used for enhancement should be particularly strict in the case of convictions resulting from guilty pleas. A represented defendant's decision to plead guilty provides a substantial guarantee that the conviction is factually reliable. A plea of guilty is a judicial admission of guilt and for that reason is a sufficiently reliable indicator of guilt that it would be rational for a State to base sentence enhancements on such admissions alone. Thus, in a case such as this one, where the record shows that the defendant was represented by counsel and pleaded guilty in the prior case, the conviction should be deemed sufficiently reliable to permit its use for sentence enhancement even if the conviction would have been subject to challenge on direct review because of some error in the guilty plea proceeding.

A defendant should not be allowed to disable the State from using his prior conviction for enhancement purposes by claiming that he was not given a complete advisement of his rights at the time he pleaded guilty in the earlier case. The requirement that a defendant be advised of his rights before pleading guilty is a prophylactic rule designed to ensure that the defendant's plea is voluntary and knowing. The omission of an advisement of rights is not a constitutional error, much less a fundamental flaw that so undermines the reliability of a prior conviction that it violates due process for a court to rely on that conviction for enhancement purposes in a later case.

II. Although we do not believe it is constitutionally required, the Kentucky courts permit a defendant in a sentence enhancement proceeding to challenge the use of his prior conviction on the ground that he was not adequately advised of the rights he

was waiving at the time he entered his guilty plea in that case. Respondent's only quarrel with the procedure employed by the Kentucky courts in his case was that it imposed on him the burden to show that he was not given the appropriate advice of rights at the time of his guilty plea. The Kentucky courts' allocation of the burden of proof is not error. This Court has long recognized that a presumption of correctness attaches to a final conviction of a represented defendant. In light of that presumption, the Due Process Clause cannot be interpreted to impose on the State the burden to show that the defendant was specifically advised of his rights before he entered his plea. The Kentucky courts' procedure that allocated the burden on that issue to respondent was therefore constitutional, and the Sixth Circuit's ruling to the contrary was wrong.

ARGUMENT

I. A GUILTY PLEA CONVICTION IS PRESUMPTIVELY VALID AND MAY BE USED FOR ENHANCEMENT PURPOSES WITHOUT PROOF THAT THE GUILTY PLEA WAS VOLUNTARY AND INTELLIGENT

A. Prior Convictions May Be Used For Enhancement of Punishment Absent A Fundamental Constitutional Infirmity That Makes Them Inherently Unreliable

One of the most familiar features of criminal sentencing is that recidivists are typically sentenced more severely than first-time offenders. That principle has been formalized in recidivist statutes and other sentence enhancement schemes that "have been enacted in all the States and by the Federal Government." *Spencer* v. *Texas*, 385 U.S. 554, 559 (1967) (footnotes omitted). The constitutionality of those

statutes, and of the general principle of imposing more severe punishment upon repeat offenders, "is no longer open to serious challenge." *Oyler* v. *Boles*, 368 U.S. 448, 450 (1962).[1]

Although the States and the federal government are largely free to define the types of convictions that may be used for sentence enhancement, the Court has imposed some limits on that freedom. In particular, the Court has held that an uncounseled felony conviction may not be used for enhancement purposes, *Burgett* v. *Texas*, 389 U.S. 109 (1967), just as such a conviction may not be relied on generally in sentencing, *United States* v. *Tucker*, 404 U.S. 443 (1972), or be used to impeach the credibility of the defendant at the guilt phase of a criminal trial, *Loper* v. *Beto*, 405 U.S. 473 (1972).

The subsequent conviction or sentence in each of those cases "depended upon the reliability of a past uncounseled conviction." *Lewis* v. *United States*, 445 U.S. 55, 67 (1980). Yet the denial of counsel in a felony case implicates "the very integrity of the fact-finding process." *Linkletter* v. *Walker*, 381 U.S. 618, 639 (1965); accord *Mackey* v. *United States*, 401 U.S. 667, 693-694 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part). As the Court has explained, because "a layman, no matter how intelligent, could not possibly further his claims of innocence and violation of previously declared

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[1] Such statutes * * * have been sustained in this Court on several occasions against contentions that they violate constitutional strictures dealing with double jeopardy, *ex post facto* laws, cruel and unusual punishment, due process, equal protection, and privileges and immunities." *Spencer* v. *Texas*, 385 U.S. 554, 560 (1967).

rights," an uncounseled conviction "lack[s] reliability." *Linkletter* v. *Walker*, 381 U.S. at 639 n.20. The right to counsel has been regarded as so fundamental to the integrity of a conviction that the Court has accorded fully retroactive effect to *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), which initially recognized the right of indigent defendants to receive appointed counsel in felony prosecutions. See, *e.g.*, *Kitchens* v. *Smith*, 401 U.S. 847 (1971); *McConnell* v. *Rhay*, 393 U.S. 2, 3 (1968); *Pickelsimer* v. *Wainwright*, 375 U.S. 2, 3 (1963).[2]

The Court has never identified any other error as sufficiently grave to disqualify a prior conviction from being considered in a sentence enhancement proceeding. We submit, however, that by analogy to the denial of counsel, a defendant should be permitted to challenge prior convictions when he can point to fundamental errors relating to the "basis protections" without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or

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[2] To be sure, the Court has made clear that in some settings, a prior conviction can properly be used in a criminal case regardless of its reliability. In *Lewis* v. *United States*, 445 U.S. 55 (1980), for example, the Court upheld a conviction for possession of a firearm by a convicted felon, even though the predicate conviction was uncounseled and therefore invalid. The Court concluded that the use of the conviction did not deny the defendant due process because Congress could rationally find that "a convicted felon, even one whose conviction was allegedly uncounseled, is among the class of persons who should be disabled from dealing in or possessing firearms because of potential dangerousness." *Id.* at 67. The federal firearms statutes, the Court noted, "focus not on reliability, but on the mere fact of conviction * * * in order to keep firearms away from potentially dangerous persons." *Ibid.*

innocence." *Rose* v. *Clark*, 478 U.S. 570, 577-578 (1986).[3]

The Sixth Circuit's ruling in this case goes far beyond that narrow category of errors. In so doing, it invites the Court to create a regime in which prior convictions will be subject to close scrutiny for procedural error before they will be eligible to be used for sentence enhancement. Such a regime would undermine the traditional freedom of legislatures to define the factors to be considered at sentencing. In addition, it would be contrary to the principles of finality, and it would create serious practical difficulties in the administration of recidivist statutes. Those policies, we submit, counsel in favor of a rule permitting challenges to prior convictions only for the denial of counsel or an error equivalent to the denial of counsel in its impact on the reliability of the prior judgment.

1. It is a familiar principle of the law of sentencing that a court may consider a broad range of factors in determining the appropriate sentence, without running afoul of the Due Process Clause. See *United States* v. *Grayson*, 438 U.S. 41, 49-50 (1978); *United States* v. *Tucker*, 404 U.S. at 446; *Williams* v. *New York*, 337 U.S. 241, 246-247 (1949). A corollary of that principle is that legislatures have great leeway in directing courts to consider particular factors in

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[3] In addition to the denial of counsel, the Court in *Rose* v. *Clark*, 478 U.S. at 577, cited the denial of a trial before an impartial judge, see *Tumey* v. *Ohio*, 273 U.S. 510 (1927), as the kind of error that "necessarily render[s] a trial fundamentally unfair." Although the *Rose* Court also suggested that introducing a coerced confession would constitute error of that magnitude, the Court subsequently made clear that introducing such evidence is not in the same class as those other errors. See *Arizona* v. *Fulminante*, 111 S. Ct. 1246, 1264-1266 (1991).

sentencing or in setting the penalties to be imposed for particular offenses and particular offender characteristics. See *Mistretta* v. *United States*, 488 U.S. 361, 364-365 (1989).

Consistent with due process, a State may permit its sentencing courts to consider a wide range of factors indicating that the defendant deserves a more severe sentence because of his criminal background. A State is not constitutionally limited to considering only error-free convictions in making such a judgment. Indeed, it is not even limited to considering convictions at all; it could, if it chose, authorize sentencing courts to consider the defendant's prior arrests or indictments, even when those events did not lead to conviction, since arrests and indictments are rational indicators of a defendant's criminal background. See *United States* v. *Cimino*, 659 F.2d 535, 538 (5th Cir. 1981); *Houle* v. *United States*, 493 F.2d 915 (5th Cir. 1974); *United States* v. *Metz*, 470 F.2d 1140, 1142 (3d Cir. 1972), cert. denied, 411 U.S. 919 (1973). Because the Kentucky legislature could have permitted enhancement of sentences for defendants with records containing indicators of criminal conduct falling short of criminal convictions, it is difficult to justify the Sixth Circuit's conclusion that because Kentucky chooses to rely on prior convictions, due process prohibits the use of those convictions if they would have been subject to procedural challenge on direct review.

2. The Sixth Circuit's decision in this case also is contrary to traditional principles of finality as applied to collateral attacks on criminal convictions. Whenever a defendant contests a final judgment of conviction in a subsequent proceeding, he confronts the principle that "a judgment can not be lightly set aside by collateral attack * * *. When collaterally

attacked, the judgment of a court carries with it a presumption of regularity." *Johnson* v. *Zerbst*, 304 U.S. 458, 468 (1938); accord *United States* v. *Frady*, 456 U.S. 152, 164 (1982) (when defendant's "chance to appeal has been waived or exhausted, * * * [a court is] entitled to presume he stands fairly and finally convicted"); *Strickland* v. *Washington*, 466 U.S. 668, 697 (1986) ("the presumption that a criminal judgment is final is at its strongest in collateral attacks on that judgment"). A challenge to the use of a prior final conviction for sentence enhancement is, of course, a type of collateral attack on the prior conviction. The same principles of finality are therefore applicable in that setting as in the more conventional setting of collateral attacks by way of habeas corpus. In fact, there are good reasons to give that presumption additional weight when a collateral attack occurs in the context of sentence enhancement.

Prior convictions offered for enhancement purposes will in many instances be from "another era from other States." *Loper* v. *Beto*, 405 U.S. at 500 (Rehnquist, J., dissenting). The remoteness of the prior convictions may present insuperable obstacles to the prosecutor's successfully defending against even nonmeritorious collateral attacks. "The States that rendered the convictions [will not be] parties to the [subsequent] * * * proceeding, and, of course, have no interest whatever in sustaining the validity of sentences long since served." *Ibid.* Moreover, the court and counsel in the subsequent proceeding "cannot be expected to have any familiarity with the vagaries of criminal procedure" in the original rendering States. *Ibid.* The prior convictions may be decades old, and any surviving witnesses may well be "sufficiently distant from the location of the [later proceedings] as to

render their voluntary appearance unlikely, and their compulsion by process impossible." *Ibid.* Moreover, because the defendant may not have considered it worth taking an appeal from the judgment against him, he may never have ordered a transcript of the proceedings leading to the prior conviction, and for that reason the record of the prior case may be difficult or impossible to reconstruct. In such instances, a rule permitting a variety of challenges to a prior conviction, and imposing on the State the burden to demonstrate the validity of that conviction, would have the incongruous effect of making the least contested convictions the ones that would be hardest for the State to qualify for use in sentence enhancement proceedings.[4]

B. The Absence Of Any Record Of A Plea Proceeding Does Not Render A Prior Final Conviction Fundamentally Unfair Or Unreliable

1. *Counseled Guilty Pleas Are Subject To Only Limited Challenge on Collateral Attack*

When a guilty plea is at issue, "the concern with finality * * * has special force." *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979). As the Court has explained, "inroads on the principle of finality

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[4] While placing the burden of proof on the defendant to show the invalidity of a predicate conviction provides some degree of protection from abusive and burdensome collateral attacks, that safeguard is not sufficient. As this case illustrates, if a broad array of errors is cognizable in a sentence enhancement proceeding, it may be much easier for a defendant to establish a prima facie case of error (by simply testifying to the omission of some procedural requirement) than for the government to find evidence to rebut it.

tend to undermine confidence in the integrity of our procedures" and inevitably delay and impair the orderly administration of justice. *Addonizio* v. *United States*, 442 U.S. 178, 184-185 n.11 (1979). The impact is greatest "when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas [and because] the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea." *United States* v. *Timmreck*, 441 U.S. at 784 (citation omitted). Accord *Hill* v. *Lockhart*, 474 U.S. 52, 58 (1985).

When a guilty plea is entered by a defendant who is represented by counsel, the practical concerns favoring finality are strongly reinforced by the high degree of reliability associated with a counseled guilty plea. "[A] counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case." *Menna* v. *New York*, 423 U.S. 61, 62 n.2 (1975) (emphasis omitted). Subject to narrow exceptions that are unrelated to factual guilt or innocence,[5] "a voluntary and intelligent plea

[5] This Court has permitted a collateral attack upon a guilty plea when the defendant pleaded guilty to a charge that, on its face, was barred by the Double Jeopardy Clause. See *United States* v. *Broce*, 488 U.S. 563, 574-576 (1989); *Menna* v. *New York*, 423 U.S. 61, 62 (1975). The Court has also allowed a collateral attack upon a plea that resulted from the prosecutor's vindictive filing of more serious felony charges after the defendant had successfully appealed a misdemeanor conviction. See *Blackledge* v. *Perry*, 417 U.S. 21, 29-31 (1974). In both situations, the Court held that the defendant had a right not to be haled into court at all and that the initiation of a criminal prosecution against him violated the Constitution. See *United States* v. *Broce*, 488 U.S. at 574-575.

of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked." *Mabry* v. *Johnson*, 467 U.S. 504, 508 (1984). Moreover, in defending against a collateral attack on a guilty plea, the State is entitled to rely on the presumption that counsel has supplied the defendant with sufficient information for the defendant to enter a voluntary and intelligent guilty plea. See *Marshall* v. *Lonberger*, 459 U.S. 422, 436-437 (1983); *Henderson* v. *Morgan*, 426 U.S. 637, 647 (1976).

Permitting a defendant to challenge a prior guilty plea conviction in a sentence enhancement proceeding would be inequitable in many cases, particularly where the guilty plea was the product of a plea bargain. A defendant who has never had his underlying conviction set aside has retained the advantages he received as part of any plea agreement. He should not be allowed to retain those advantages while preventing the plea from being used to his disadvantage in a later prosecution. In this case, respondent never denied that he was guilty of the 1981 felony, and he testified that he received a "good deal" when he received a sentence far less than the maximum. 5/28/87 Tr. 38-41. The consequence of the Sixth Circuit's ruling in this case is that respondent's "good deal" became even better, while the State was not even given the theoretical opportunity of retrying him on the original charges, which it would have had if he had challenged his guilty plea through habeas corpus.

2. Boykin v. Alabama *Claims Are Not Cognizable On Collateral Review*

In spite of the strong interests in the finality of guilty pleas, the Sixth Circuit held that respondent's 1979 and 1981 guilty plea convictions could not be

used for sentence enhancement. The court did so because the Commonwealth failed to prove that the prior convictions complied with the dictates of this Court's decision in *Boykin* v. *Alabama*. The entire premise of the court of appeals' decision, however, rests on a misapprehension of *Boykin*. The procedures set forth in that case are not themselves constitutional requirements, much less essential components of a criminal trial without which the trial cannot serve as a reliable device for resolving guilt or innocence. Instead, the requirements of *Boykin* are prophylactic rules designed to safeguard certain rights that are implicated when a defendant enters a guilty plea. Thus, a *Boykin* error, even if one were found in this case, would not justify a collateral challenge to the use of the guilty plea convictions for enhancement purposes.

a. The defendant in *Boykin* pleaded guilty to five counts of robbery and was sentenced to death. His conviction and sentence were affirmed, and this Court granted review. Reasoning that a guilty plea is not merely a confession, but a conviction, the Court determined that the record should reflect the valid waiver of each of the rights a defendant gives up by pleading guilty. 395 U.S. at 242-243. In particular, the Court observed that a guilty plea waives (1) the privilege against compulsory self-incrimination, (2) the right to a jury trial, and (3) the right to confront adverse witnesses. *Id.* at 243. Declining to "presume a waiver of these three important federal rights from a silent record," *ibid.*, the Court reversed the defendant's conviction, *id.* at 244.

In so doing, the Court outlined the proper means of placing on the record the elements of a valid plea of guilty. Because of the serious consequences of pleading guilty, the Court indicated that state trial

courts should "canvass[] the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence." 395 U.S. at 244. That process, the Court explained, "leaves a record adequate for any review that may later be sought, * * * and forestalls the spin-off of any collateral proceedings that seek to probe murky memories." *Ibid.*

The Court in *Boykin* did not hold, or even suggest, that the plea at issue in that case was not the product of a voluntary and knowing waiver of the defendant's rights. Rather, "[t]he new element added in *Boykin* was the requirement that the record must affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and voluntarily." *Brady* v. *United States*, 397 U.S. 742, 747-748 n.4 (1970). It can hardly be said, therefore, that a trial court's failure to comply with the prophylactic requirements of *Boykin* amounts to an error of constitutional dimension, much less one that implicates fundamental fairness to an extent comparable to the complete denial of the right to counsel.

b. In light of the presumption of regularity accorded to final criminal convictions, it is doubtful whether respondent's collateral attack on his prior convictions even stated a claim for relief under *Boykin*. The court of appeals did not find that the trial judges in those cases had failed to advise respondent of his rights, but based its *Boykin* ruling on the absence of evidence that he had been so advised. Indeed, even respondent's testimony did not establish that the warnings were omitted; although respondent testified that he could not recall having been advised of all of his constitutional rights, he conceded that he might have been so advised. Since both convictions

were entered long after *Boykin* was decided, the presumption of regularity should be sufficient to justify the assumption that, absent proof to the contrary, the appropriate advice was given.

Even if the absence of records was sufficient to call into question whether the plea proceeding complied with *Boykin*, a violation of *Boykin*'s requirements should not be sufficient to justify collateral relief from a final conviction. In light of the interests underlying the finality of criminal judgments, prophylactic rules designed to protect constitutional guarantees but not themselves part of the constitutional right at issue are enforceable on direct review, but not on collateral attack. See, *e.g.*, *Stone* v. *Powell*, 428 U.S. 465, 480-482, 491-492 n.31 (1976) (exclusion of evidence under the Fourth Amendment); *United States* v. *Timmreck*, 441 U.S. at 784 (guilty plea advisement requirement in federal courts); see also *Duckworth* v. *Eagan*, 492 U.S. 195, 211-213 (1989) (O'Connor, J., concurring) (claims brought under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), should not be cognizable on collateral review because *Miranda* warnings are prophylactic). This Court's decisions under Fed. R. Crim. P. 11, which governs plea proceedings in the federal courts, confirm that *Boykin* claims should be governed by the same dual approach to direct and collateral review.

As *Boykin* does for state court judges, Rule 11 requires federal judges to address defendants who wish to plead guilty, in order to ensure that the defendants understand the nature and consequences of their pleas. The purpose of Rule 11 is the same as the purpose that underlies *Boykin's* "on-the-record advisement" requirement for guilty pleas. See *Brady* v. *United States*, 397 U.S. at 749 n.6; *Boykin* v. *Ala-*

bama, 395 U.S. at 246-247 (Harlan, J., dissenting). Because a defendant's guilty plea waives "his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers," Rule 11 seeks to ensure that his plea is truly voluntary and to create an adequate record for any post-conviction challenge. *McCarthy* v. *United States*, 394 U.S. 459, 466 (1969). In *McCarthy*, which was decided just two months before *Boykin*, this Court enforced the prophylactic requirements of Rule 11 by reversing a conviction on direct review, because the district judge had not inquired into the defendant's understanding of the charges, as required by Rule 11. 394 U.S. at 472.

The Court subsequently made clear that Rule 11 violations, although they implicate the process by which the voluntariness of a guilty plea is assured, do not call into question the fundamental fairness of the underlying conviction.[6] First, in contrast with its treatment of cases involving the right to counsel under *Gideon* v. *Wainwright*, *supra*, the Court gave *McCarthy* only prospective application. See *Halliday* v. *United States*, 394 U.S. 831 (1969).[7] Although this Court has never spoken to the issue, the courts of appeals have consistently declined to apply *Boykin*

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[6] Indeed, the Court in *McCarthy* made explicit that it was not resting its decision on constitutional grounds, and emphasized that Rule 11 had not been held to be constitutionally required. 394 U.S. at 464-465.

[7] The Court explained that although strict compliance with Rule 11 gave greater assurance of the voluntariness of the plea, the issue of voluntariness could be raised independently of Rule 11. *Halliday* v. *United States*, 394 U.S. at 832-833. Hence, the retroactivity of *McCarthy* was not essential to make certain that a guilty plea was in fact voluntary.

retroactively.[8] That is strong evidence that violations of the prophylactic rules of *Boykin* and Rule 11 are not the kind of errors that necessarily undercut the reliability of a guilty plea. Cf. *Linkletter* v. *Walker*, 381 U.S. at 639 ("in each of the three areas in which we have applied our rule retrospectively, the principle that we applied went to the fairness of the trial—the very integrity of the fact-finding process").

Second, in *United States* v. *Timmreck*, *supra*, the Court held that a violation of Rule 11's prophylactic requirements, without more, is not cognizable on collateral review. The defendant in *Timmreck* asserted that a Rule 11 violation had occurred because the district court accepted his plea without informing him of a mandatory special parole term. In holding that the defendant's claim was not cognizable under 28 U.S.C. 2255, the Court explained that a formal violation of Rule 11 "is not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with rudimentary demands of fair procedure." 441 U.S. at 783. For the same reason, a formal violation of the prophylactic requirements of *Boykin* should not be regarded as the kind of error that can be raised when a prior conviction is used for enhancement purposes in a subsequent prosecution.

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[8] See, *e.g.*, *Berry* v. *Mintzes*, 726 F.2d 1142, 1146 (6th Cir.), cert. denied, 467 U.S. 1245 (1984); *United States* v. *Pereira*, 574 F.2d 103, 105 n.5 (2d Cir.), cert. denied, 439 U.S. 847 (1978); *Mathis* v. *Hocker*, 459 F.2d 988, 989 (9th Cir. 1972); *Dominguez* v. *Henderson*, 447 F.2d 207, 209 (5th Cir. 1971) (citing cases); *Meller* v. *Missouri*, 431 F.2d 120, 124 (8th Cir. 1970), cert. denied, 400 U.S. 996 (1971).

II. KENTUCKY LAWFULLY IMPOSED ON RESPONDENT THE BURDEN OF SHOWING THAT HIS PRIOR GUILTY PLEAS WERE NOT KNOWING AND INTELLIGENT

Although, for the reasons set forth above, we do not think they are constitutionally required to do so, the Kentucky courts permit defendants in PFO proceedings to challenge their prior guilty plea convictions on the ground that they failed to comply with *Boykin* v. *Alabama*.[9] Respondent's only objection to the procedure employed by the Kentucky courts in this case was that it imposed on him the burden of showing a violation of *Boykin*. The Sixth Circuit agreed that the Commonwealth's allocation of the burden of proof on that issue was unconstitutional, and that the Commonwealth bore the burden of establishing compliance with *Boykin*.

The burden of proof issue is important in this context, because it will often be difficult, especially for the State, to offer detailed evidence regarding prior guilty plea proceedings. The allocation of the burden of proof therefore may be determinative in many cases as to whether a prior conviction can be used for enhancement.

The Sixth Circuit's rule is contrary to well-established principles governing the allocation of the burden of proof on collateral review of convictions.[10]

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[9] The Kentucky courts have permitted such challenges not because of any requirement of Kentucky law, but because of the perceived compulsion of federal constitutional law. See *Commonwealth* v. *Gadd*, 665 S.W.2d 915, 917 (Ky. 1984). As a matter of state law, the prosecution is required to prove only the fact of a prior qualifying conviction; it is not required to prove "that the previous conviction was not obtained by constitutionally inpermissible means." *Id.* at 918.

[10] In addition, even if the Commonwealth had the burden of proving that respondent made a voluntary and know-

As this Court has explained, a party collaterally attacking a conviction has the burden of showing its invalidity. See, *e.g.*, *Tollett* v. *Henderson*, 411 U.S. 258, 268 (1973); *Johnson* v. *Zerbst*, 304 U.S. at 468-469. That principle is equally applicable to challenges to prior convictions used for enhancement purposes. In *Loper* v. *Beto*, *supra*, both the plurality and the dissenting Justices recognized that a defendant who attacks a prior conviction used for enhancement bears the burden of proving the constitutional invalidity of the prior conviction. 405 U.S. at 479-480 n.4 (opinion of Stewart, J.) (assuming defendant bears the burden); *id.* at 499, 502 (opinion of Rehnquist, J.). There are very strong practical reasons for adhering to this allocation of proof in the context of penalty enhancement proceedings:

> [T]heoretically speaking, any given conviction might suffer any of a myriad of constitutional defects. Practically speaking, it is the defendant, not the probation officer or the Government, who will know any particular defect-related details of any particular prior conviction. For such reasons, the Sentencing Commission (and courts) in related sentencing areas have said that, once the Government establishes the existence of a prior conviction, the burden shifts to

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ing waiver of his constitutional rights, the Sixth Circuit erred in requiring a standard of proof higher than the preponderance of the evidence. This Court has held that the Constitution is satisfied if the prosecution proves the waiver of federal rights by a preponderance of the evidence. See, *e.g.*, *Colorado* v. *Connelly*, 479 U.S. 157, 167-169 (1986) (*Miranda* rights); *Lego* v. *Twomey*, 404 U.S. 477, 487-489 (1972) (confession). There is no basis for requiring a heightened standard for proving a waiver in a sentence enhancement proceeding.

the offender to show that the conviction violated the Federal Constitution.

United States v. *Wilkinson*, 926 F.2d 22, 26 (1st Cir. 1991) (Breyer, C.J.), cert. denied, 111 S. Ct. 2813 (1991). At most, then, respondent would be entitled to collateral relief only if he could supplement the "silent record" with persuasive proof that his prior pleas were not voluntary and intelligent.[11]

In light of these principles, the Sixth Circuit erred in holding respondent's 1981 conviction invalid.[12] The Commonwealth proved that respondent signed a form

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[11] We recognize that, in the right-to-counsel cases, a defendant may establish a prima facie case of error on collateral review by showing that his conviction was uncounseled; a court will not presume from a silent record that the defendant waived his right to counsel. *Burgett* v. *Texas*, 389 U.S. at 114-115. As discussed, however, the right to counsel is a "bedrock procedural rule," see *Mackey* v. *United States*, 401 U.S. at 693-694 (Harlan, J., concurring in the judgments in part and dissenting in part), that is so fundamental that it applies retroactively, see *Burgett* v. *Texas*, 389 U.S. at 114. By contrast, *Boykin* established a prophylactic rule that has not been applied retroactively. In addition, "[t]he purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights." *Johnson* v. *Zerbst*, 304 U.S. at 465. To presume that a defendant knowingly and intelligently waived his right to counsel by not asking for it would be contrary to the very premise of that right. As we have noted, however, when a defendant who is represented by counsel pleads guilty, there is a presumption that counsel supplied him with the information necessary to enter a valid guilty plea. See *Marshall* v. *Lonberger*, 459 U.S. at 436-437; *Henderson* v. *Morgan*, 426 U.S. at 647.

[12] The Sixth Circuit did not vacate the district court's judgment as it pertained to the 1979 guilty plea, and respondent has not cross-petitioned on that issue.

two years earlier acknowledging that he had been advised of his constitutional rights. Contrary to the court of appeals' reasoning, the district court was entitled to conclude that since respondent had been advised of his rights before pleading guilty in 1979, he was aware of those rights when he pleaded guilty in 1981. Cf. *Marshall* v. *Lonberger*, 459 U.S. at 457 (defendant's experience in criminal justice system is relevant in determining whether he understood his rights).

Moreover, respondent himself admitted that the judge in 1981 specifically questioned him to ensure that his plea was voluntary, and that the judge informed respondent that he "had a right to a jury trial." 5/28/87 Tr. 19-20. Respondent also conceded that the judge "could have said more" and in fact may have advised him of his other rights. *Id.* at 41-42. The essence of respondent's testimony was that he could not remember the trial court's advising him of his rights. Even assuming that a defendant may challenge the voluntariness of his prior guilty plea in a sentence enhancement proceeding, respondent's showing was inadequate to justify holding his 1981 guilty plea invalid. See *United States* v. *Gallman*, 907 F.2d 639, 644 (7th Cir. 1990) ("The lack of explicit proof that [the defendant] was aware of his constitutional rights does not prove that he was unaware of those rights."), cert. denied, 111 S. Ct. 1110 (1991).

In addition, respondent never suggested that he would have declined to plead guilty in 1981 had he been advised of his rights, or that he was not guilty of the crime for which he was convicted. Indeed, he stated that he had discussed the 1981 charges with his counsel, that he was unable to suggest any witnesses

to call, that he admitted committing the charged offenses, and that he pleaded guilty voluntarily to get what he believed was a "good deal." 5/28/87 Tr. 38-41. Hence, there is no persuasive reason to forbid the Commonwealth from using respondent's 1981 guilty plea conviction to enhance the sentence imposed on his 1987 robbery conviction.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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